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Res Ipsa Loquitur in Hospital and Malpractice Cases

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THE EXPERIENCE IN OHIO, the first few years after *Avellone*, has shown that though hospitals may now be subject to liability for ordinary negligence to patients, successful recovery against hospitals for such negligence is almost as infrequent as it was before *Avellone*. Perhaps the biggest single obstacle to recovery is the almost universal reluctance of physicians to testify in cases against hospitals. The same reasons that militate against their testifying in malpractice cases seem to prevail here. As well, plaintiff's counsel are beginning to discover that juries tend to be more sympathetic to hospitals as a group than to most other classes of defendants. This is particularly the case where the hospital is under the control of some religious organization.

Perhaps the most difficult problem confronting a plaintiff's attorney is his inability to secure witnesses who can or will testify in court about the origin of his client's injury. Most typically, the injury produced by the hospital's negligence occurs at a time when the plaintiff is unable to comprehend what is going on around him, either by reason of the fact that he is unconscious from drugs or sedation, or by reason of the fact that the illness or injury which was responsible for his hospital confinement has so dulled his senses that he is incapable of later recollecting what happened to him. Any other persons about at the time of plaintiff's injury are usually not friendly to him when he sues. I should like to recite the facts of a recent case of mine as an example of the above.

The plaintiff entered a downstate Ohio hospital as a patient of an orthopedic surgeon in that community because of severe distress which he was suffering in his low back. After several days of unsuccessful conservative treatment, the surgeon decided to perform a laminectomy. Prior to the operation the plaintiff was in perfect health save for his low back difficulty. Plaintiff was given an anesthetic as he was leaving his room for the operating room, became unconscious shortly after and remained in that unconscious state for about three hours, during which time he was operated on, placed in a recovery room and returned back to his own room before regaining consciousness. Immediately after coming out from under his anesthetic in his own room, plaintiff noticed that he had a crescent shaped laceration on his upper right cheek, which ended at the outer corner of his right eye, as well as redness in and irritation and tearing

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of that eye. Plaintiff subsequently developed an ulcer in that right eye, requiring treatment for the period of approximately one month, and as an aftermath was left with a permanent corneal scar in the eye. Plaintiff had no idea of the origin of the scratch on his face other than a dim recollection that as he was in the process of coming out of his anesthetic in his hospital room he felt the sharp edge of what appeared to be a plastic pillow case over his pillow, at about eye level.

The plaintiff, at the time that he was first aware of the injury to his right cheek and right eye, had no idea of the precise manner in which this injury was inflicted. Three years later, at the time of trial, he still had no idea as to the precise manner in which that laceration occurred. During that period of time when the incident took place, while plaintiff was unconscious, there was no friendly witness who could assist the plaintiff in explaining the cause of this injury. Every other person in a position to know how this happened was either an employee of one of the defendants or a defendant himself.

Suit for plaintiff's injuries was filed jointly against the hospital, the surgeon and the anesthetist.

Though by the discovery process available in this state it was possible to identify most of the persons who exercised some control over the plaintiff from the time that he left his hospital room to go down to surgery until he regained consciousness several hours later, none of these witnesses who were available for deposition were able to throw any light on the origin of plaintiff's facial and eye injuries. Several of these witnesses were no longer in the jurisdiction. Those who could be deposed, in most instances said they could remember only what they saw on written records of the hospital and physicians. We were encountering the difficulties characteristic of the situation where one must make his case with his adversary's witnesses.

Therefore, it became obvious that the only way in which plaintiff could hope to get his case to a jury was by use of the doctrine of res ipsa loquitur against all defendants. The injury involving plaintiff's face and eye was a portion of his anatomy far removed from the site of his laminectomy. The nature of the injury indicated that it was the type of injury which ordinarily would not occur but for someone else's negligence.

Had all of the persons in whose charge plaintiff had been just prior to, during and after the operation been employees of the hospital, there would be no question of the applicability of the doctrine of res ipsa loquitur, in this state or in any other common law jurisdiction. Here, however, the plaintiff was for some period of time under the control of the operating surgeon. This surgeon was clearly not in the general employ of the hospital and was in all probability an independent contractor. As well, there was in attendance during the course of the operation an anesthetist who likewise was not in the general employ of the hospital who may have exercised some control over the plaintiff during the period of his unconsciousness. Therefore, at least two defendants and perhaps three had to be named in order to fully

include all of the persons, either as principals or agents, who had any charge over the plaintiff during that period of time when his injuries must have occurred.

Most legal texts state as a matter of law that in order to apply the doctrine of res ipsa loquitur it is required that plaintiff show that the instrumentality causing his injury was in the *continuous* and *exclusive* control of one defendant. This general proposition has been stated in Ohio on several occasions. However, in the last few years some exceptions to this general rule have been established in several jurisdictions.

For example, some courts have held that a passenger in a carrier, who is injured by reason of a collision between the carrier and another vehicle, may sue both under the doctrine of res ipsa loquitur.[1] A similar result has been permitted by some courts in claims arising out of the collision of two airplanes.[2] Some courts have permitted claimants to employ res ipsa against several defendants where the injury has been caused by the explosion of a bottle of beverage.[3] Where the claimant has been injured by a falling object coming from an area of construction on which several contractors have been simultaneously working, the application of res ipsa against multiple defendants has been once more allowed.[4] And, most significantly for our purposes, courts have permitted application of this doctrine against multiple defendants where the claimant sustained his injuries while a patient at a hospital.

The landmark case is *Ybarra vs. Spangard.*[5] There the plaintiff, while a patient at defendant hospital, sustained injury to his shoulder while undergoing an appendectomy. At the time that the injury occurred plaintiff was unconscious. A suit was filed against the hospital, two doctors, and two nurses all of whom had custody over the plaintiff at some time during the period of his unconsciousness. The California Supreme Court affirmed plaintiff's right to invoke res ipsa against all of the named defendants, holding that where a patient received unusual injuries while unconscious and in the course of medical treatment, all of those defendants who had any control over his body or the instrumentalities which may have caused his injuries could

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1 Jackson v. Capital Transit Co., 72 W. L. R., 718 (D. C. Mun. App.) 38 A 2d 108 (1944); Osgood v. Los Angeles Traction Co., 137 Cal. 280, 70 P 169 (1902); Cox v. Scott, 104 N. J. Law 371, 140 N. E. 390 (1928).

2 Smith v. O'Donnell, 215 Cal. 714, 12 P 2d 933 (1932).

3 Claxton Coco Cola Bottling Co. v. Coleman, 68 Ga. App. 302, 22 S. E. 2d 768 (1944); Nichols v. Nold, d. b. a. Pepsi Cola Co., 174 Kan. 613, 258 P 2d 316, (1953); Lock v. Confair, 372 Pa. 212, 93 A 2d 451 (1953).

4 Schroeder v. City and County Savings Bank, 293 N. Y. 370, 57 N. E. 2d 57, (1945), Meany v. Carlson, 6 N. J. 82, 77 A 2d 248.

5 Ybarra v. Spangard, 25 Cal. 2d 486, 154 P 2d 687, 162 A. L. R. 1258 (1944); Noted, 25 B. U. L. R. 295 (1944), 33 Cal. L. R. 331 (1944), 18 So. Cal. L. R. 310 (1944). As to subsequent proceedings see Comment, 63 Harv. L. R. 643 (1950).

properly be called on to meet the inference of negligence by giving an explanation of their conduct.

The California Court had the following to say on page 689:

> As pointed out above, if we accept the contention of defendants herein, there will rarely be any compensation for patients injured while unconscious. A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. They may be, for example, preparation for surgery by nurses and interns who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors, and post-surgical care by the surgeon, a hospital, physician and nurses. The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

The doctrine of the *Ybarra* case has been followed on a number of subsequent occasions, both in California and elsewhere.[6]

There are several reasons, express or implicit, given in the above cases for extending the doctrine of res ipsa loquitur to multiple defendants when plaintiff is injured undergoing surgery or treatment in a hospital.

The first is that in each of these above cases the plaintiff was unconscious, either from the application of drugs, or so near to unconsciousness from excruciating pain that he was himself unable to give any explanation of the cause of his injury. It appears from the examination of the above opinions that had anyone of those plaintiffs been conscious at the time of his injury and able to tell for himself what happened to him the doctrine of res ipsa loquitur would most certainly not have been applied.

The second reason is that plaintiff either paid or was obligated to pay for the services performed by the defendants when he placed himself in their custody. Just as in the above cited cases, where courts have permitted the doctrine of res ipsa loquitur to apply against multiple defendants for injuries sustained by passengers of carriers involved in collision with other vehicles, the court here apparently concludes that if a custodian

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[6] Cavero v. Franklin General Benevolent Society, et al., 36 Cal. 2d 301, 223 P 2d 471 (1950), noted 24 So. Cal. L. R. 324 (1950); Bowers v. Olch, 120 Cal. App. 2d, 108, 260 P 2d 997 (1953); Oldis v. La Societe Francaise de Bienfaisance Mutuelle, 130 Cal. App. 2d 461, 279 P 2d 184 (1955); Diermann v. Providence Hospital, 179 P 2d 603, (Cal., 1947); Frost v. Des Moines Still College of Osteopathy and Surgery, 248 Iowa 29, 79 N. W. 2d 306 (1956).

of an injured person is being paid by that person for services, that by virtue of the contract entered into between the injured party and the custodian, the injured party requires a duty of explanation from the custodian of the cause of injuries, to a greater degree than in the case where there would be no contract between the parties.

A third element is that the multiple medical defendants, though having separate identities in that the operating physicians and the anesthetists are ordinarily treated as independent contractors rather than employees of the hospital, nevertheless have an extremely close relationship with each other and the hospital in the care and treatment they jointly perform on behalf of the plaintiff-patient. The operating doctor is extended staff privileges at the hospital only after being rigidly screened by hospital officials. The privilege to use the hospital facilities is not afforded to all physicians.[7] Frequently a doctor has operating privileges at but one hospital, and seldom more than a very few. Likewise, the anesthetist typically limits his services to a small number of hospitals. During the course of an operation, aside from the operating physician and the anesthetist, there are usually nurses present who are in the general employ of the hospital. The business of taking a patient from his room to the site of the operation, thence to the recovery room, and thence to his own room is a highly complex operation which requires the closest of cooperation and coordination among physicians and the hospital. Therefore, one does not find that separateness and independence of operation which ordinarily characterizes independent contractors or the activity of most joint tort feasors who are sued jointly as defendants.[8]

Another factor is that if all of the named defendants together constitute all of the persons who exercised any control over the person of the plaintiff during that period of time that he was injured, then collectively they have the power to rebut the inference created by the doctrine of res ipsa loquitur. To explain this more fully we ought to digress for a moment to touch upon the significance of the doctrine of res ipsa loquitur in the trial of a lawsuit.

In Ohio, as in most of the jurisdictions, the doctrine of res ipsa loquitur does not raise a presumption of negligence but merely permits an inference of negligence. It is solely an evidential inference for the consideration of the jury, and the jury may give this inference as much or as little weight as it deems fit.

Therefore, even if the plaintiff has presented in his case in chief sufficient evidence to warrant the application of res ipsa loquitur, the defendants in their case in chief have the oppor-

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[7] See, Perr, Hospital Privileges Revisited, 9 Clev-Mar. L. R. 137 (1960).

[8] See, McCoid, Negligence Actions Against Multiple Defendants, 7 Stan. L. R. 480 (1955).

tunity to rebut that inference by coming forward with evidence to show that they had no connection with the claimed injury.

As indicated above, where an injury occurs to plaintiff-patient while undergoing surgery or treatment by a hospital employee or doctors, the only witnesses to the injury are necessarily either the defendants themselves or employees of the defendant. If they are innocent of responsibility for the injury, then they have full opportunity to rebut the inference by bringing those persons before the court and jury to testify as to their innocence.

This is pointed out in a very fine article written by Professor Louis J. Jaffe of Harvard Law School, entitled *Res Ipsa Loquitur Vindicated.*[9] Professor Jaffe writes that, though it is usually required for res ipsa loquitur that the defendant be in control of the mischief-working instrumentality, such control should not be a condition for applying the doctrine. Rather (on page 6) he says:

> The determining factor should be the defendant's power—if not in the very case, at least in the class of case in question—to rebut the adverse inference. Control is relevant but not necessary. Control is in any case a hopelessly ambiguous concept. . . .

Where the defendants, the hospital and doctors, together have control over plaintiff during the entire period of time in which his injury must have occurred, they possess the power to explain the cause of the injury. If they are able to do so, let them come forward with their witnesses to explain it away. If they cannot, having the power to explain and being unable to do so, it is minimum justice that the inference be permitted to go to the jury, which may or may not find a verdict for the plaintiff.

A final word ought to be said about the practical effect of the application of this doctrine as relates to presentation of testimony to the jury in this type of case.

If this doctrine is not applied, then plaintiff's counsel, in order to try to get his case to the jury, must bring forward agents of the defendants themselves as his witnesses in his case in chief in an effort to establish how the plaintiff's injury occurred. Even under the recent change in the Ohio Code, which permits for the first time cross-examination of defendant's agents,[10] it is the almost universal experience of plaintiffs' attorneys that this method of producing evidence is far less satisfactory than cross-examination of the same witness after defendant's counsel has first examined this witness directly. As Professor Jaffe points out in the above-cited article, being able to ask an opponent questions is inferior to the right to compel him to "make on his own initiative a full accounting." [11]

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[9] 1 Buffalo L. R. I (1951-2).

[10] Ohio Rev. Code, § 2317.52.

[11] 1 Buffalo L. R. p. 14, supra, n. 7.

The most significant difference is that the witness, who must first make a full accounting in direct examination before being cross-examined by opposing counsel, somehow develops a much finer memory of the facts surrounding the matters about which he testifies than does the same witness who is brought forward solely on cross-examination. My own experience has been that among hospital employees there seems to be a tendency, where such witness is cross-examined on deposition or on trial, to give the same pat answer to all of the important questions concerning the alleged injury, to-wit: "I have seen so many patients around the hospital that I just can't remember one from the other." The witness who cannot remember is useless to the attorney who must establish a prima facie case.

But when the inference of res ipsa loquitur permits plaintiff's counsel to get his case to the jury without first being compelled to make his case from the testimony of hostile witnesses, it then becomes the duty of counsel for the defendants to bring forward witnesses of their own who will affirmatively testify to facts that will tend to rebut the inference. It is amazing to see the improvement in the memory of these hostile witnesses when they are asked to testify on behalf of their employer.

Even when these hostile witnesses testify in defendants' case in chief unfavorably to the plaintiff, the mere fact that these witnesses have affirmatively committed themselves to an account of how the injury occured, gives plaintiff's counsel an opportunity to effectively use his arts of cross-examination in a manner that counsel never can where the witness claims to be ignorant of the matters about which he is being questioned.

It is evident that the duty of explanation put upon the defendants by virtue of the application of res ipsa loquitur is likely to insure that a greater degree of probative evidence will be placed in the jury's hands before the close of the case. The greater the number of facts presented to the jury, the more likelihood that the ultimate truth will be reached by the jury in their verdict. Hence it is our belief that the use of the doctrine of res ipsa loquitur in cases of this kind is more than apt to result in a just and correct verdict in the vast majority of cases.

In the State of Ohio, the Supreme Court has not yet been compelled to decide the specific issue raised by the *Ybarra* case. However, on several occasions Supreme Court and lower court opinions have stated that the doctrine of res ipsa loquitur applies only where the instrumentality producing injury to the plaintiff was under the exclusive control and management of a single defendant.[12]

Recently there was dicta in the case of *Schutts v. Siehl, et*

[12] City of Cleveland v. Amato, 123 Ohio St. 575, 176 N.E. 227 (1931) (res ipsa loquitur held not applicable in suit against municipality for injuries due to failure of proper care and maintenance of a manhole cover since evidence showed several other persons had equal control over such manhole); Koktavy v. United Fireworks, 160 Ohio St. 461, 117 N.E. 2d 16 (1954)

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al.[13] to the effect that the doctrine of res ipsa loquitur could not be applied to a hospital and to a physician jointly. In the above case there was some considerable doubt as to the precise time when plaintiff's alleged injury took place, and there was strong evidence that such injury may very well have occurred after plaintiff had left the hospital where he was confined at the time that the second defendant performed his work upon him. Therefore there was a strong possibility that plaintiff was not still in the control of the defendants at the time his injury originated.

In spite of the language in the above cases, one cannot say with certainty that the Ohio Supreme Court would refuse to adopt the *Ybarra* rule, since none of the previously mentioned decisions in the State have dealt with the precise set of facts we are here concerned with, to-wit: an unconscious plaintiff who while unconscious sustains injury of the sort not likely to have occurred but for the negligence of some third party or parties during the time that he was under the control of several named defendants, whose collective control covered the entire period of time he must have received his injury. The application of the *Ybarra* doctrine would not be inconsistent with any of the above cited decisions in Ohio.

If the *Ybarra* doctrine is adopted by Ohio, no rash of plaintiffs' verdicts against hospitals and doctors need be anticipated. Defendants have full opportunity to rebut the inference by presenting their account of the way in which the plaintiff was injured. Any witnesses to the occurrence are most certainly going to be more sympathetic to the defendants than to the plaintiff. Defendants may still rely upon the generally sympathetic attitude expressed by jurors to date in cases against hospitals and physicians. These defendants may still count upon the reluctance of medical doctors to testify against hospitals, even in those cases where the source of the injury was from administrative rather than professional error. It is safe to conclude that the vast majority of cases involving injuries sustained by patients in hospitals still would be lost if tried before a civil jury.

But the adoption of the rule of res ipsa loquitur to the situation described herein fairly permits recovery in some few cases where otherwise the fact of the plaintiff's unconsciousness at the time of his injury would bar recovery.

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(res ipsa loquitur not applicable to manufacturer of fireworks where evidence showed that there was extensive handling by others before the ultimate use by the consumer); Brown v. Pennsylvania Greyhound, 29 Ohio Op. 442, (C. P., 1945) (doctrine not applicable where injuries incurred by reason of collision of two vehicles); Curry v. Great Atlantic & Pacific Tea Co., 67 Ohio L. A. 569, 119 N.E. 2d 142 (1954) (res ipsa loquitur not proper for injuries resulting from explosion of bottle where petition on its face indicated such explosion was likely the result of mishandling by retailer).

[13] 109 Ohio App. 145 (1959).